STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2014
v	No. 317694 Marquette Circuit Court
JASON ANDREW SAUMIER, Defendant-Appellant.	LC No. 12-050441-FC

Before: MURPHY, C.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his jury trial convictions of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and seven counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b) (victim at least 13 but less than 16 years of age and a member of the same household as defendant).[2] Defendant was sentenced to 25 to 50 years' imprisonment for each first-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that the trial court abused its discretion in denying his motion for a new trial premised on his claim that a juror was not impartial. We disagree. "We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010) (citations omitted). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). Regard is given to the trial court's special opportunity to assess the credibility of witnesses who

[1] *People v Saumier*, unpublished order of the Court of Appeals, entered February 25, 2014 (Docket No. 317694).

[2] The jury found defendant not guilty of one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a).

appeared before it. MCR 2.613(C). Constitutional issues are reviewed de novo. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008), citing US Const, Am VI; Const 1963, art 1, § 20. Jurors are presumed to be impartial until the contrary is shown. *Miller*, 482 Mich at 550. "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id*. A defendant is not entitled to a new trial any time a juror had a preconceived opinion or feeling. *Id*. at 553 n 15.

"The rule is well established that jurors may not impeach their verdict by affidavits. To permit this would open the door for tampering with the jury subsequent to the return of their verdict." *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824 (1945). "[O]nce a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). "[W]here the alleged misconduct relates to influences internal to the trial proceedings, courts may not invade the sanctity of the deliberative process." *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). See also *People v Graham*, 84 Mich App 663, 666; 270 NW2d 673 (1978) ("Affidavits or testimony to impeach a jury's verdict are properly received when they concern overt acts, accessible to the knowledge of all the jurors.").

"[T]he distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the 'irregularity' occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence." *Budzyn*, 456 Mich at 91. To establish error requiring reversal, the defendant must prove that the jury was exposed to extraneous influences that created a real and substantial possibility they could have affected the verdict. *Id*. at 88-89. Generally, a defendant must show that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. *Id*. at 89. If the defendant makes this showing, the burden then shifts to the prosecutor to demonstrate that the error was harmless beyond a reasonable doubt. *Id*.

The trial court properly concluded that defendant failed to establish that the juror in question, Juror 61, was partial or that his impartiality was in reasonable doubt. During voir dire, the prosecutor asked if any prospective jurors felt that they "might not be able to" do a fair job and evaluate the case based on the evidence that was presented. Juror 61 and a few other prospective jurors raised their hands. Although the prosecutor did not engage with Juror 61 directly, the prosecutor had an exchange with another prospective juror who expressed a concern, and the prosecutor emphasized that the jury had to make its decision based on the evidence that was presented and that it was the prosecution's burden to prove its case beyond a reasonable doubt. Later in the selection process, defense counsel likewise emphasized that the prosecutor had the burden of proof beyond a reasonable doubt and then directly engaged Juror 61 in the following question and answer:

MR. QUINNELL: Another way to explain it may be to say, as you're sitting in the jury room, not proven equals not guilty. Not proven equals not guilty. [Juror 61], do you understand that concept about this possibility?

JUROR [61]: Yes.

Later, after being selected for the jury, Juror 61, along with the other jurors, swore an oath to justly decide the question submitted and to render a true verdict based only on the evidence introduced in accordance with the court's instructions. At various points throughout the trial, the court instructed the jury to keep an open mind and not to make a decision about anything in the case until the jury heard all of the evidence and went to the jury room to begin deliberating. In its final instructions, the court again emphasized that the jury must return a true and just verdict based only on the evidence and the court's instructions, and not to let sympathy or prejudice influence its decision. The court explained that defendant is presumed to be innocent throughout the trial and that he was entitled to a verdict of not guilty unless the jury was satisfied beyond a reasonable doubt that he was guilty. The court said that the fact that defendant was charged with a crime was not evidence. The court also instructed the jurors to keep an open mind as they listened to their fellow jurors. The jury deliberated for more than four hours before reaching a verdict and during its deliberation asked to have some testimony replayed.

Overall, the record fails to establish that Juror 61 was not impartial. Although he raised his hand in response to a preliminary question about whether he might not be able to do a fair job and evaluate the case based on the evidence presented, the prosecutor then addressed another juror's concern on the same issue, defense counsel directly engaged Juror 61 to ensure he understood the prosecutor's burden of proof, Juror 61 swore an oath to justly decide the case and to return a true verdict based only on the evidence presented, and the court instructed the jury numerous times to keep an open mind and to decide the case based only on the evidence and the court's instructions. Jurors are presumed to follow a trial court's instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Further, Juror 61's impartiality is reflected in his vote with the other jurors to acquit defendant of the ninth count in the information, charging defendant with fourth-degree criminal sexual conduct. Defendant was not denied a trial by a fair and impartial jury.

Testimony by another juror, Juror 75, at a hearing on defendant's motion for a new trial fails to establish that Juror 61 was partial. Juror 75 testified that Juror 61 said during a break in the jury selection process that he did not "like people like that" and that "basically" his decision was already made. Defendant fails to address the trial court's determination that Juror 75's testimony comprised inadmissible hearsay. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

But even if Juror 75's testimony was admissible, the trial court found that Juror 75 lacked credibility based on her demeanor while testifying, her expression of complete shock at the guilty verdict even though she did not participate in deliberations, the affirmative steps she took to contact defense counsel after learning of the verdict, and her appearance as essentially an advocate for defendant. This Court defers to a trial court's assessment of the credibility of

witnesses who appeared before it. MCR 2.613(C). We are not left with a definite and firm conviction that the trial court made a mistake in declining to credit Juror 75's testimony. Further, Juror 75's testimony fails to establish an extraneous or outside influence; her testimony merely related to Juror 61's comments to her, and there is no evidence that other jurors heard the comment. Juror 75 was randomly excused from the jury before deliberations began, and she did not discuss the case with the other jurors. In short, the purported misconduct was internal to the trial proceedings, *Fletcher*, 260 Mich App at 539, and did not concern an overt act accessible to the knowledge of all the jurors, *Graham*, 84 Mich App at 666.[3] Therefore, no basis exists on which Juror 75's testimony could be used to impeach the verdict. Likewise, the trial court's declination to question Juror 61 concerning this matter did not comprise error given that Juror 61's purported statements did not concern an extraneous or outside influence. The trial court's decision to deny defendant's motion for a new trial fell within the range of principled outcomes.

Defendant's next argument on appeal is that the trial court abused its discretion in denying defendant's request for production of the victims' privileged mental health records and in declining to conduct an in camera review of all of the records. We disagree. "A trial court's decision regarding discovery is reviewed for an abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). A trial court's decision concerning whether to conduct an in camera review of records is also reviewed for abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *People v Jackson*, 292 Mich App 583, 592; 808 NW2d 541 (2011).

There is no general constitutional right to discovery in criminal cases. *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994). Nonetheless, "[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *Id*. at 666. In *Stanaway*, our Supreme Court addressed "the difficult task of reconciling the state's compelling interest in protecting the confidentiality of counseling and juvenile diversion records with the defendant's federal and state constitutional rights to obtain evidence necessary to his defense in a criminal trial." *Id*. at 649. The *Stanaway* Court held:

> [W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential to the defense. Only when the trial court finds such evidence, should it be provided to the defendant. [*Id*. at 649-650.]

[3] See also *People v Johnson*, 245 Mich App 243, 259 n 6; 631 NW2d 1 (2001) (opinion by O'CONNELL, P.J.) (concluding that the *Graham* exception for overt acts accessible to all the jurors did not apply "because the allegation, that the juror had decided defendant's guilt before the trial began, involved her alleged subjective feelings, which were not within the jury's knowledge.").

"In general, when a discovery request is made disclosure should not occur when the record reflects that the party seeking disclosure is on a fishing expedition to see what may turn up." *Id*. at 680 (quotation marks omitted). A generalized assertion that counseling records may contain evidence useful for impeachment on cross-examination is insufficient. *Id*. at 681. A defendant must state a specific articulable fact to establish that the requested information is necessary to prepare the defense. *Id*. Absent a specific request, the defendant is fishing. *Id*.

Consistent with the holding in *Stanaway*, MCR 6.201(C) provides, in relevant part:

> **(C) Prohibited Discovery.**
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> (1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
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> (2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.
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> (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
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> (c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
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> (d) The court shall seal and preserve the records for review in the event of an appeal
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> (*i*) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense . . . .

Here, defendant asked the trial court to conduct an in camera review of counseling records of the two complainants, KL and AL. The court denied an in camera review but later, on defendant's renewed motion, reviewed only those mental health records that were contained in the confidential portion of the court's family division files concerning KL. The court determined that the records contained no information necessary to the defense.

On appeal, defendant does not contest that the counseling records are privileged but contends that the records are likely to contain evidence necessary to the defense and therefore should have been disclosed. We disagree. The trial court did not abuse its discretion in deciding that an in camera review of all of the requested records was not warranted or in determining that the records in the court file that the court reviewed should not be made available to defense counsel.

An in camera inspection of the victims' counseling records was not required because defendant failed to demonstrate a good-faith belief, grounded in articulable fact, that the records were likely to contain material information necessary to the defense. Defendant argues that the records may contain information that could be used in cross-examining the victims. Defendant cites statements by the victims' mother, JS, suggesting that she did not initially believe the victims' allegations against defendant and that they mirrored allegations against the victims' biological father, HL, from a decade ago. Defendant notes that the victims have been in counseling since 2006, apparently related to the abuse by HL. Essentially, defendant is suggesting that the victims' accusations against defendant may be false because they mirror the allegations against HL, and that evidence to support this theory may be contained in the victims' counseling records. This claim is purely speculative. Defendant articulated no facts specifying how the allegations against him mirrored those against HL, aside from JS's general statement that they were similar. Nor has defendant articulated any facts indicating that the supposedly similar accusations against HL led the victims to falsely accuse defendant, let alone that the counseling records contain information to support this theory. We conclude that defendant's allegations are insufficiently particularized to warrant an in camera review of the victims' counseling records. Defendant's argument is rejected because his generalized assertions reflect a mere desire to review the victims' counseling records as a fishing expedition to see what may turn up. *Stanaway*, 446 Mich at 650, 680.

Further, the trial court properly found that the mental health records contained in the confidential portion of the court's family division files revealed no evidence necessary to the defense. After reviewing those records, the trial court, as required by MCR 6.201(C)(2)(d)(*i*), sealed and preserved the records for appellate review. We agree with the trial court that the confidential records contained no information necessary to the defense. The trial court properly declined to direct that the records be made available to defense counsel. MCR 6.201(C)(2)(b).

Defendant next argues that the trial court abused its discretion in excluding from evidence JS's petition for a personal protection order against HL. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id*. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

As this Court explained in *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013):

> Generally, all relevant evidence is admissible except as otherwise provided by either the state or the federal constitution or by court rule. MRE 402;

> *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

"[R]elevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Defendant contends that the trial court abused its discretion in excluding JS's 2004 petition for a PPO against HL. Defendant asserts that paragraph four of the petition would have supported the defense theory that the victims' allegations against defendant mirrored the allegations against HL, by showing that HL sexually abused the victims. However, the petition made no reference to the allegations that HL sexually abused AL and KL. Instead, as defense counsel's own reading into the record of paragraph four of the petition showed, it referred only to "domestic violence" and did not specify the nature of the domestic violence.[4] JS testified outside the presence of the jury that HL was very violent toward her, and she could not be certain regarding whether she knew of HL's sexual abuse of the children when she filed the petition because it was so many years ago. Because the petition did not directly reference HL's alleged sexual assaults of AL and KL, it did not have a tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Therefore, the trial court did not abuse its discretion in finding that the petition was not relevant.

Further, the jury had already heard testimony that HL sexually abused AL and KL. KL and AL each testified about being sexually abused by HL. And JS acknowledged in her testimony in front of the jury that she told a police officer that KL's allegations against defendant sounded very similar to the allegations against HL. Therefore, even if the petition had referenced HL's sexual assaults, admission of such evidence would have been cumulative. Finally, the trial court did not abuse its discretion in concluding that admission of further evidence concerning HL's acts would have confused the issues, given that the jury was not required to determine whether HL committed sexual abuse.

Defendant's next appellate argument is that the trial court relied on inaccurate factual information and erred in scoring prior record variables (PRVs) 2 and 6. We disagree. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citations omitted).

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[4] Although defendant does not rely on it, we note that paragraph five of the petition checked a box stating that HL was "assaulting, attacking, beating, molesting, or wounding" JS, defendant, AL, KL, and JS's son. Again, this language does not specify that HL had sexually assaulted AL or KL.

PRV 2 addresses prior low severity felony convictions. MCL 777.52(1). A court is to score five points if the offender has one prior low severity felony conviction. MCL 777.52(1)(d). Defendant does not contest that the Colorado offense at issue, felony larceny between $500 and $15,000, is a prior low severity felony offense. See MCL 777.52(2) (defining "prior low severity felony conviction" to include a felony under a law of another state in certain circumstances). Instead, defendant argues that he had no prior conviction in Colorado because he received what he calls an "unsupervised dismissal" of the charge. However, a "conviction" for the purpose of PRV 2 is defined broadly to include, for example, assignment to youthful trainee status, in which a judgment of conviction is not entered, and a conviction that has been set aside. See MCL 777.50(4)(a); *People v Williams*, 298 Mich App 121, 125; 825 NW2d 671 (2012). The Colorado deferred sentencing statute provides that where a defendant pleads guilty, the court may continue the case for the purpose of entering judgment for up to four years while imposing probation-like supervision conditions. Colo Rev Stat 18-1.3-102; *People v Carbajal*, 198 P3d 102, 105-106 (Colo, 2008). Given the broad definition of "conviction" for the purpose of scoring PRV 2, defendant's deferred sentencing status following his guilty plea under the Colorado statute constituted a "conviction" for the purpose of scoring PRV 2. The trial court did not err in scoring five points for PRV 2.

PRV 6 addresses the offender's relationship to the criminal justice system. MCL 777.56(1). Under this variable, ten points are to be assessed if "[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony." MCL 777.56(1)(c). In scoring PRV 6, the appropriate points must be assessed if the offender is involved in the criminal justice system in another state. MCL 777.56(2). For the purpose of scoring PRV 6, "delayed sentence status" includes certain circumstances in which an offender is subject to discharge and dismissal without an adjudication of guilt under various Michigan statutes. See MCL 777.56(3)(a) and statutory provisions cited therein. "The phrase 'criminal justice system' is not limited to adversarial criminal proceedings." *People v Anderson*, 298 Mich App 178, 182; 825 NW2d 678 (2012). It includes the collective institutions through which an alleged offender passes until the accusations are disposed of or the assessed punishment is concluded. *Id*., citing *Black's Law Dictionary* (9th ed). "This Court has refused to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists." *Anderson*, 298 Mich App at 182 (quotation marks omitted). Here, the Colorado statute under which defendant received a deferred sentence permitted the imposition of probation-like supervisory conditions following a guilty plea. Because the record establishes that defendant was on what was effectively a type of probation called deferred sentence status in Colorado, the trial court did not err in assessing ten points for PRV 6.

Defendant next contends that the trial court erred in departing upward from the sentencing guidelines range. We disagree. This Court reviews for clear error the factual determination whether a particular factor for departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Clear error is present when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012). Whether a particular factor is objective and verifiable is reviewed de novo as a matter of law. *Babcock*, 469 Mich at 264. The determination whether the factors in a case constitute substantial and compelling reasons for departure is reviewed for an abuse of

discretion. *Id*. at 264-265. "The trial court abuses its discretion when its result lies outside the range of principled outcomes." *Anderson*, 298 Mich App at 184.

The guidelines minimum range was 108 to 180 months. The trial court departed upward, imposing sentences of 25 to 50 years for each first-degree criminal sexual conduct conviction.[5] The trial court explained why it found substantial and compelling reasons for a departure:

> I do find substantial and compelling reasons for departing upwards at the minimum on that count, which would otherwise be set at the minimum of 15 years. I do find that Offense Variable 4, which only allows for up to 10 points, does not sufficiently address the serious psychological injury that has occurred to [KL] as a result of these events. She was in residential treatment and therapy at time of trial, and continues to the present time.
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> And also I find that the exploitation of victim vulnerability under Offense Variable 10 is also not sufficient to characterize the degree of exploitation that occurred here. The sexual assault on [KL] occurred over a period of four years. They included stressors on the child that you were the only household income to the family, and if any of this was reported, that this would all be to blame on her, and she obviously has carried that forward. And I find that degree of exploitation, and the repetitive nature of this conduct, and the large number of sexual acts that occurred over that four-year period is simply not accounted for adequately in the Offense Variables.
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> So for those reasons, I do find substantial and compelling reasons to depart upward.

Based on these reasons, the court imposed 25- to 50-year sentences for Counts II through VIII.

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3).

> In order to be substantial and compelling, the reasons on which the trial court relied must be objective and verifiable. To be objective and verifiable, a reason

[5] The upward departure pertained to Counts II through VIII. Because Count I was for first-degree criminal sexual conduct that occurred when KL was less than 13 years of age and defendant was 17 years of age or older, the trial court was statutorily required to impose a minimum sentence that was not less than 25 years for that count. See MCL 750.520b(2)(b) (stating that where the defendant is 17 years of age or older and the victim is less than 13 years of age at the time of the offense, first-degree criminal sexual conduct is punishable "by imprisonment for life or any term of years, but not less than 25 years"). Thus, imposition of the 25-year mandatory minimum sentence for Count I was not a departure. See MCL 769.34 ("Imposing a mandatory minimum sentence is not a departure under this section.").

> must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed. The reasons for departure must also be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. [*Anderson*, 298 Mich App at 183 (quotation marks and citations omitted).]

Further, "[a] trial court's reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record." *Id*. at 185. A trial court may "not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b); see also *Anderson*, 298 Mich App at 187.

In a cursory argument, defendant asserts that "[t]he factors relied on by the sentencing judge are adequately addressed by the sentencing guidelines: substantial and compelling reasons are absent." Defendant contends without elaboration that there is "an absence of compelling reasons that irresistibly grab one's attention to justify the upward departure." We disagree.

Offense variable (OV) 4 addresses psychological injury to a victim. MCL 777.34(1); *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). The statute provides for a score of 10 points if "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1). The fact that treatment has not been sought is not conclusive, MCL 777.34(2); *Lockett*, 295 Mich App at 182-183, and a victim's expression of fearfulness or anger can constitute sufficient evidence of psychological injury, *Williams*, 298 Mich App at 124. Although OV 4 accounts for victims' psychological injuries, it does not "always account for the unique psychological injuries suffered by individual victims." *Anderson*, 298 Mich App at 189, citing *People v Smith*, 482 Mich 292, 302; 754 NW2d 284 (2008). Here, OV 4 was scored at 10 points. There was evidence that KL not only suffered psychological injury requiring treatment, but that her psychological harm was so severe that it required extended and ongoing treatment. At trial, KL testified that she was living in a treatment facility because she had been cutting herself and threatening to kill people, behaviors that began after she disclosed defendant's abuse. JS also testified that KL began cutting herself after reporting the abuse. JS explained that KL became suicidal and was hospitalized several times related to anxiety and depression, and she could not be home as of the time of trial. AL testified that KL had not been home since April 2012, when the abuse was disclosed. Given the serious psychological harm to KL, involving self-harm and requiring her to stay on an ongoing basis in treatment facilities, the trial court did not err in finding that this factor was given inadequate weight by the guidelines. Further, this reason for departure is objective and verifiable. It is based on testimony in the record concerning actions or occurrences external to the mind of the decision-maker and is capable of being confirmed.

OV 10 concerns exploitation of a vulnerable victim. MCL 777.40(1). A score of ten points is required if "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his authority status." MCL 777.40(1). Here, OV 10 was scored at ten points. The trial court did not err in finding that this factor was given inadequate weight by the guidelines. Defendant, who was KL's stepfather, sexually abused her repeatedly from the time she was 11 years old until KL disclosed the abuse

when she was 14 years old. KL estimated that the sexual abuse occurred over 100 times, sometimes as often as three times a week. Defendant told KL that if she ever disclosed the abuse, he would kill KL and her mother, JS. The extent of defendant's exploitation of KL, including the repetitive and ongoing nature of the sexual abuse over several years and defendant's tactics to keep KL from disclosing it, are not adequately accounted for in the guidelines. See *Smith*, 482 Mich at 301 ("The fact that defendant abused the victim for more than a year was not reflected in the guidelines."). Further, this reason for departure is objective and verifiable as it is based on testimony in the record and is external to the mind of the decision-maker. See *id.* ("That sexual abuse occurred over a long period is an objective and verifiable reason for departure.").

Overall, we find no error in the conclusion that these factors keenly and irresistibly grab one's attention, warranting a departure. The trial court did not abuse its discretion in finding substantial and compelling reasons to depart from the guidelines range.

Defendant next argues that his sentencing violated the Sixth Amendment and the Fourteenth Amendment because the trial court engaged in judicial fact-finding that increased the floor of the permissible sentence, contrary to *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). We disagree. This Court recently held in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), that the decision in *Alleyne* does not apply to Michigan's indeterminate sentencing scheme and the sentencing guidelines that effectuate it:

> While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, the maximum of which is set by law, it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to a jury trial. *Alleyne*, 570 US at ___; 133 S Ct at 2163 & n 6.
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> * * *
>
> We hold that judicial fact-finding to score Michigan's sentencing guidelines falls within the " 'wide discretion' " accorded a sentencing court " 'in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]' " *Alleyne*, 570 US at ___ n 6; 133 S Ct at 2163 n 6, quoting [*Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949)]. Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [that] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163. [*Herron*, 303 Mich App at 403-405 (brackets in original; citation omitted).]

Defendant's argument on this issue is premised on the application of *Alleyne* to Michigan's indeterminate sentencing scheme, a premise that has been rejected by *Herron*. Thus, in light of this Court's holding in *Herron*, defendant's argument lacks merit.[6]

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. This issue is unpreserved because defendant did not move for a new trial or an evidentiary hearing on this ground. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Our review is therefore limited to mistakes apparent on the existing record. *Id*. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *Id*. This Court reviews any findings of fact for clear error, but the ultimate constitutional issue arising from an ineffective assistance claim is reviewed de novo. *Id*.

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for trial counsel's errors." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Petri*, 279 Mich at 411. This Court does not substitute its judgment for that of counsel regarding matters of trial strategy, nor does it assess counsel's performance with the benefit of hindsight. *Id*.

Defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. Defendant asserts that defense counsel failed to follow up with Juror 61 after Juror 61 raised his hand in response to a preliminary question whether he might not be able to do a fair job and evaluate the case based on the evidence presented. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (opinion by O'CONNELL, P.J.) (citations omitted). As discussed, after Juror 61 raised his hand, the prosecutor addressed another juror's concern on the same issue, and defense counsel later directly engaged Juror 61 to ensure he understood the

[6] As the prosecutor notes, defendant received a mandatory minimum sentence of 25 years for Count I pursuant to MCL 750.520b(2)(b), which provides that where the defendant is 17 years of age or older and the victim is less than 13 years of age at the time of the offense, first-degree criminal sexual conduct is punishable "by imprisonment for life or any term of years, but not less than 25 years." Defendant does not argue that any improper judicial fact-finding occurred with respect to the imposition of this mandatory minimum sentence for Count I. The jury necessarily found that KL was less than 13 years of age when it found defendant guilty of first-degree criminal sexual conduct under MCL 750.520b(1)(a) (victim under 13 years of age), and defendant admitted that he was born in 1970 and was 42 years old at the time of trial. The offenses in this case occurred from 2008 through 2012. Defendant's argument on this issue does not challenge the mandatory minimum sentence in Count I but instead contests the use of judicial fact-finding to score the offense variables with respect to Counts II through VIII. As discussed above, his argument lacks merit under the holding in *Herron*.

prosecutor's burden of proof. Because Juror 61 expressed his understanding of the prosecutor's burden, and there was no further indication that he was biased, the record does not establish that defense counsel's conduct in retaining Juror 61 on the jury was objectively unreasonable.

Even if defense counsel's failure to ask Juror 61 further questions or to challenge Juror 61 comprised deficient performance, defendant has not established a reasonable probability of a different outcome but for the deficient performance. After being selected for the jury, Juror 61 swore an oath to justly decide the case and to return a true verdict based only on the evidence presented, and the court instructed the jury numerous times to keep an open mind and to decide the case based only on the evidence and the court's instructions. Jurors are presumed to follow a trial court's instructions. *Breidenbach*, 489 Mich at 13. The trial court declined to credit Juror 75's testimony concerning Juror 61's purported hearsay statements that his mind was already made up. This Court defers to a trial court's assessment of the credibility of witnesses who appeared before it. MCR 2.613(C). Further, defendant has not shown that, but for Juror 61's presence on the jury, the outcome of the trial likely would have been different. In addition to KL's testimony concerning defendant's sexual abuse of her, KL's T-shirt recovered from her bedroom contained semen stains with defendant's DNA profile, and defendant made incriminating statements to police. Overall, the record fails to support defendant's ineffective assistance of counsel claim.

Defendant's cursory argument concerning ineffective assistance of counsel makes a general assertion that "the failure to make a proper objection and record fell below an objective standard of reasonableness and constituted an omission outside the wide-range of professionally competent assistance." It is not clear if defendant is suggesting ineffective assistance of counsel concerning any aspect of counsel's performance other than the failure to further question or challenge Juror 61. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly*, 231 Mich App at 640-641.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael J. Kelly